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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 545

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION, A CORPORATION,

Appellant,

vs.

CLARENCE OWEN

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 545

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION, A CORPORATION,

Appellant,

vs.

CLARENCE OWEN,

Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS

Appellee asserts that the statutory provision, Title 28, U. S. Code, Section 1257 (2), relied on by the Appellant does not sustain the jurisdiction of the Court; the unsubstantial character of the grounds stated by the Appellee and the lack of substance in the questions raised by this appeal and the fact that no federal question was raised or decided are apparent on the face of the record as to warrant the Court to summarily refuse to take jurisdiction and to dismiss the appeal.

Nature of the Case

This was a suit to construe a Kansas insurance statute. The insuring clause was in large black type guaranteeing to pay for confining illness $80.00 per month. Then in small light type there was a limitation of payments for only twelve months. The large black type payments in the insuring clause is easily read by any one. Down in the small type section limiting payments for twelve months, one really needs a microscope. The statute was intended to prevent a policyholder from being tricked. It was an anti-trick statute and a wholesome one.

The Supreme Court of Kansas construed said statute and held it valid and enforceable and held that no federal question was involved. It was decided on non-federal grounds.

U. S. v. *Hastings*, 296 U. S. 188;

Enterprise Irrigation District v. *Canal Company*, 243 U. S. 151;

Rio Grande Western Railroad Co. v. *Stringham*, 239 U. S. 44.

Matters and Grounds Making Against Jurisdiction

The principal grounds making against the jurisdiction of this Court is the appellant's failure to challenge the constitutionality of the Kansas statute before the Supreme Court of Kansas. The record shows that the validity of the statute (G. S. 1935, Section 40-1109 (a) (6) and (i)) was not drawn in question as repugnant to the United States Constitution; and for this reason alone the appeal must be dismissed.

Powell v. *Supervisors of Brunswick County*, 150 U. S. 433;

Jett Brothers Distilling Company v. *Carrollton*, 252 U. S. 1;

Memphis Natural Gas Company v. *Beeler*, 315 U. S. 649.

No Constitutional Question Was Raised Before the Supreme Court of Kansas

The record shows that appellant did not contend that the insurance statute (G. S. 1935, Section 40-1109 (a) (6) and (i)) was unconstitutional or violated any of its rights; the rule is universal that absent such an allegation and absent a writing on the point by the Court; there is nothing before this Court and the appeal will have to be dismissed.

Honeyman v. *Hayman*, 300 U. S. 14;
Melon v. *O'Neil*, 275 U. S. 212;
Pfleger v. *Sherman*, 283 U. S. 52;
Hoover v. *Evatt*, 324 U. S. 652.

The Supreme Court of Kansas in finding that no constitutional question was presented to it said:

"Defendant, as appellant here, presents two questions for our determination:

"1. As to both appeals, whether G. S. 1935, Section 40-1109 (a) (6) and (i) as construed by this court in the opinions reported at 166 Kan. 525 and 168 Kan. 10 violates the Constitution of the United States by depriving defendant of property without due process of law and impairing the obligation of contracts.

"2. As to appeal No. 38366, whether the decisions reported at 166 Kan. 525 and 168 Kan. 10 are erroneous and ought to be overruled."

As to the first question presented, the trial court found that it was without merit, and also found that the question was not timely raised, particularly with reference to the first case. With respect to that the record discloses that the first case (our present No. 38,365) was filed in the district court on June 24, 1946; that defendant first filed a motion to make the petition definite and certain by attaching

thereto a copy of the policy of insurance, and an amended petition was filed in which that was done. Defendant demurred to the amended petition upon the ground that it did not state facts sufficient to constitute a cause of action. This demurrer was considered by the trial court and overruled, and defendant appealed to this court. An opinion of this court affirming the judgment of the trial court was filed on March 5, 1949, and reported in 166 Kan. 525, 203 P. 2d 196. The appellant filed a motion for rehearing, which was granted and the case set for our July, 1949 session. The case was reargued by counsel, who filed additional briefs, and a brief on appellant's behalf was filed amici curiæ. The court reexamined the questions originally argued and those argued on rehearing, and in an opinion handed down on October 9, 1949, adhered to its former opinion (168 Kan. 10, 210 P. 2d 232). No further motion for rehearing was filed by the appellant and our mandate went down on October 31, 1949. At no time or place in the consideration of that case did the defendant ever contend or suggest that the statute (G. S. 1935, 40-1109 (a) (6) and (i)) violated the federal constitution, nor did it contend that our opinion filed on March 5, 1949, either alone or in connection with the statute, violated the federal constitution.

The invalidity of the statute could have been raised by the demurrer filed (see cases cited in the annotation 71 A. L. R. 1194) and perhaps the wording of the demurrer was broad enough to raise the question but it was not contended either in the trial court or in this court that the demurrer should be sustained upon that ground.

If counsel for defendant considered the statute constitutional, if standing alone, but that it had been rendered unconstitutional by our decisions handed down on March 5, 1949, that question was not raised by the motion for rehearing; neither was it suggested in the briefs or arguments upon the rehearing, and of course was not raised by a

motion for rehearing after our decision handed down on October 9, 1949, for appellant filed no such motion for rehearing. No effort was made to take the case to the Supreme Court of the United States by appeal or by certiorari.

In this situation the authorities appear to support appellee's contention that appellant waived the constitutional question now presented. In 16 C. J. S. 225 the rule is thus stated:

> "While in considering a question affecting the constitutionality of an act it is the court's duty to exercise some discretion in determining the time when it shall be presented, it is the general rule, subject apparently to some qualifications, that such question must be raised at the earliest opportunity consistent with good pleading and orderly procedure, or it will be considered as waived, and even ignorance of pertinent facts is not an excuse for failure to assert constitutional rights at the proper time. Accordingly, a constitutional objection not raised by the pleadings ordinarily may not be raised later at trial. . . . In some jurisdictions, the constitutionality of a particular statute upon which a pleading is based may be raised by general demurrer thereto."

Citing, among other cases, *Railroad Co.* v. *Abilene*, 78 Kan. 820, 98 Pac. 224, where it was held:

> "The unconstitutionality of a statute or of proceedings under a statute need not be pleaded with any greater definiteness or certainty than other issues. . . ."

And on page 823 it was said: "A general demurrer will raise the question." The point being, however, the question must be raised; it cannot be simply ignored.

A similar statement of the rule is found in 12 C. J. 785 and 11 Am. Jur. 772. Each of these general authorities cites a number of federal and state decisions. And in *Yakus*

v. *United States*, 321 U. S. 414, 64 S. Ct. 660, 88 Law. Ed. 834, the court had occasion to say (page 444):

> "No procedural principle is more familiar to this court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." (Citing authorities.)

In this case we feel compelled to hold that appellant, by not raising the federal constitutional question in this case until after our decisions in 166 Kan. 525 and 168 Kan. 10 waived the right to present them. Further, we are convinced that if appellant thought our decisions above mentioned violated its rights under the federal constitution appellant should have taken steps by appeal or certiorari to have our decisions reviewed by the Supreme Court of the United States; and, not doing so, it is not in a position now to contend that the order violated the federal constitution."

The opinion of the Supreme Court of Kansas found as a matter of fact that no constitutional question was presented to it and the finding of a State Court upon matters of fact are conclusive.

Noble v. *Mitchell*, 164 U. S. 367;
Chrisman v. *Miller*, 197 U. S. 313;
Waters-Pierce Oil Co. v. *Texas*, 212 U. S. 86;
Miedreich v. *Lauenstein*, 232 U. S. 236;
Willoughby v. *Chicago*, 235 U. S. 45;
Merchants Mutual Auto. Liability Ins. Co. v. *Smart*, 267 U. S. 126;

and this Honorable Court "from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds."

Herb v. *Pitcairn*, 324 U. S. 117, 125;

Sylvester v. *Washington*, 215 U. S. 80;
Lem Woon v. *Oregon*, 229 U. S. 586;
John v. *Paullin*, 231 U. S. 583;
Erie R. R. v. *Tomkins*, 304 U. S. 64;
Ruhlin v. *N. Y. Life Ins. Co.*, 304 U. S. 202.

From the foregoing, it is to be observed that the statutory provision (28 U. S. C. 1257 (2)) relied on by appellant does not sustain the jurisdiction of this Court.

No Substantial Federal Question Is Presented by the Attempted Appeal

The presence of a substantial Federal question is essential to invoke the jurisdiction of this Court. If the questions presented are plainly unsubstantial, jurisdiction is not taken.

Levering & Garrigues Co. v. *Morrin*, 289 U. S. 103, 105.

A claim of unconstitutionality where (a) it is "obviously without merit," or (b) "its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy."

Ex Parte Poresky, 290 U. S. 30, 32;
Levering & Garrigues Co. v. *Morrin*, *supra*.

And the construction of the statute adopted by the highest appellate court of the State of Kansas and its interpretation of the scope of the law, must be accepted as conclusive.

Osborne v. *Florida*, 164 U. S. 650, 654;
Missouri ex rel. Hurwitz v. *North*, 271 U. S. 40;
Sioux Remedy Co. v. *Cope*, 235 U. S. 197;
Farncomb v. *Denver*, 252 U. S. 7;
McGregor v. *Hogan*, 263 U. S. 234;

Neblett v. *Carpenter*, 305 U. S. 297;
Alton R. Co. v. *Illinois Commerce Commission*, 305 U. S. 548;
Williams v. *Kiaser*, 323 U. S. 471, 473.

In *Utley* v. *St. Petersburg*, 292 U. S. 106, the Court held that estoppel and laches are non-Federal grounds. The Court said (p. 111):

> "Finally, the appellants are barred, or so the Supreme Court of Florida has held, by laches and estoppel. They stood by without opposition while the property was improved. They refrained from making use of remedies, both administrative and judicial, that were ready to their call. For nearly five years they held aloof without word or act of protest, and then invoked the aid of equity. Following *Abel* v. *Boynton*, 95 Fla. 984, 117 So. 507, and other state decisions, the Supreme Court of Florida withheld an equitable remedy from suitors who had slept upon their rights. By force of that ruling, the decree of the state court rest upon a non-federal ground broad enough to support it."

Motion to Dismiss Appeal for Want of a Substantial Federal Question Properly Raised

Therefore, comes now the appellee, by his attorneys, and moves the Court to refuse jurisdiction and to dismiss the appeal for want of a substantial federal question.

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Dated: January 10, 1952.

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FILED
JAN 31 1952
CHARLES ELMORE CROPLEY
CLERK

In the

Supreme Court of the United States

October Term, 1951.

No. 545.

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, a corporation, *Appellant*,

vs.

CLARENCE OWEN, *Appellee*.

REPLY TO APPELLEE'S STATEMENT IN OPPOSITION TO JURISDICTION AND MOTION TO DISMISS.

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REPLY TO APPELLEE'S STATEMENT IN OPPOSITION TO JURISDICTION AND MOTION TO DISMISS.

ARGUMENT.

We fail to see how appellee can fairly contend that appellant failed to draw into question the constitutionality of General Statutes of Kansas of 1935, Section 40-1109 a (6) and i, before the Supreme Court of Kansas. At the outset of its opinion of July 3, 1951, that court recognized that the statute was challenged on constitutional grounds. The cases of *Powell* v. *Supervisors of Brunswick County*, 150 U. S. 433; *Jett Brothers Distilling Company* v. *Carrollton*, 252 U. S. 1; and *Memphis Natural*

Gas Co. v. *Breier*, 315 U. S. 649, all cited by appellee, simply stand for the principle that charges of discriminatory action by administrative officials acting under state statutes do not draw into question the constitutionality of the statutes themselves.

The written parts of the record which show presentation of these constitutional questions to the Supreme Court of Kansas are as follows:

(a) Appellant's answers in each case filed in the District Court of Lincoln County, Kansas,

(b) The opinion of July 3, 1951, handed down by the Supreme Court of Kansas, and

(c) Appellant's motion for rehearing filed on July 20, 1951, after the rendition of that opinion.

We recognize the rule that constitutional points must be presented at the first opportunity consistent with orderly procedure. We also concede that these points were not raised in appeal No. 38365 until after a demurrer had been filed and overruled, and an interlocutory appeal taken. The points were, however, raised in the answer, which was the first pleading filed after remand on the interlocutory appeal. Since evidence was introduced on these points, they could not have been raised by demurrer. See the discussion of Assignment of Error No. 4 in our jurisdictional statement. And as is shown by the discussion of Assignment of Error No. 5, there, the constitutional points in appeal were raised in case No. 38366 on the first occasion on which appellant entered that case in the trial court.

Although this Court will permit state courts to adopt reasonable procedural standards, the question as to whether claims of federal rights are properly presented is ultimately a federal question. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, l. c. 680-682.

In the present case the claim of the Supreme Court of Kansas that these points were not timely raised is unreasonable, as is shown by contentions in our jurisdictional statement, not answered by appellee,

> (a) That to deny us these points in case 38365 constitutes a misapplication of the scope of demurrers and motions for rehearing under established Kansas procedure.
>
> (b) That to deny them as to case 38366 constitutes an unreasonable and unwarranted application of the doctrine of collateral estoppel, in a manner contrary to the decision of this Court in *Cromwell* v. *County of Sac*, 93 U. S. 351.

The Supreme Court of Kansas, furthermore, assumed to decide these constitutional points. The opinion specifically states that the court finds no constitutional infirmity in the statute, and cites cases from other states on the point. If a state court expressly decides a federal question, then this Court has jurisdiction to review the decision, no matter when the question was raised. *Great Northern Ry.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 53 S. Ct. 145; *Whitfield* v. *State of Ohio*, 297 U. S. 431, 56 S. Ct. 532.

Nor is there any merit in appellee's claim that the Supreme Court of Kansas decided these cases on adequate and independent non-federal grounds. The decision of that court is based entirely on application of the state statute, the constitutionality of which we question. A decision on this basis necessarily rules our federal claims adversely to us. The rule invoked by appellees applies only if the state court by its opinion would reach a result adverse to the party claiming an improper application of federal law, even if upholding his claim under federal law. For example, if a state court holds that a

certain state statute violates both the state and the federal constitutions, nothing would remain for review by this Court because the holding as to the state constitution would be sufficient to determine the case.

Aside from the exaggerated claims as to the size of type in the policy (which type is reproduced as part of our jursidictional statement), appellee produces no argument to show that our federal claims are unsubstantial on the merits.

For the reasons adduced in our jurisdictional statement, the Court should note probable jurisdiction of his appeal and set the case for argument.

Respectfully submitted,

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